22/08/2022

African Group Submission Suggesting Amended Text for the Payment Regime Provided for in the Draft Regulations on the Exploitation of Mineral Resources in the Area

Introduction

The African Group has the pleasure of making this submission suggesting amended text for the payment regime contained in the Draft Regulations on the Exploitation of Mineral Resources in the Area (Draft Regulations).

The amendments suggested in this Submission would, if adopted, significantly strengthen the payment regime and contribute to Deep-Seabed Mining (DSM) only occurring if it is demonstrably beneficial to mankind.

The amendments suggested in this Submission are underpinned by the detailed analysis contained in the African Group Submission on the Payment Regime for Deep-sea Mining in the Area, June 2022, which is available at: African_Group_Submission_Payment_Regime.pdf (isa.org.jm).

This Submission uses two sources for the Draft Regulations, namely:

a.) The Chairman of the Open-Ended Working Group on the Financial Terms of Contracts Briefing Note, July 2022 (BNFTC)[1]; which is available at: Briefing_Note_OEWG_13_June_2022.pdf (isa.org.jm); and

b.) Draft Regulations on the Exploitation of Mineral Resources in the Area, Collation of Specific Drafting Suggestions by Members of the Council, December 2019 (DRSDS). The formal reference for this document is: ISBA/26/C/CRP.1, and it is available at: collation_of_specific_drafting_suggestions_for_posting_0.pdf (isa.org.jm)

When a draft regulation is included in both the BNFTC and DRSDS, then the draft regulation is quoted from the BNFTC. This approach is followed as the draft regulations included in the BNFTC account for edits suggested in the informal working groups, while the DRSDS predates those working groups.

[1] The full title of this document is: 'Fifth Meeting of the Open-ended Working Group of the Council on the financial terms of a contract under article 13, paragraph 1 of Annex III to the United Nations Convention on the Law of the Sea and under section 8 of the Annex to the Agreement relating to the implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, 18-19 July 2022, Kingston, Briefing Note'. This document is available at: https://isa.org.jm/files/files/documents/Briefing_Note_OEWG_13_June_2022.pdf

Table 1: Amended Text for Financial Regulations in the Draft Regulations

Source	Reg	Text (Amended Text Marked in Track Changes)	Explanation and Justification
DRSDS	23	New '5.' to read '5. The Commission shall consider whether the Transferor and Transferee have submitted all documentation relating to the Direct Transfer of Rights Tax and whether that tax has been paid to the Authority by the Transferor' Old '5.' which would be new '6.' if the above edit is accepted to read '5. The Commission shall not recommend the approval of the transfer if : (a) it would involve conferring on the transferee a Plan of Work, the approval of which would be forbidden by article 6 (3) (c) of annex III to the Convention; (b) it would Permit the transferee to monopolize the conduct of activities in the Area with regard to the Resource category covered by the exploitation contract or the transferee would monopolize or significantly control the production of any single mineral or metal produced globally; or c) the Transferor has not paid the Direct Transfer of Rights Tax to the Authority on the Transfer' 'Old '8.' new '9.' to have the following text added 'd. payment of the Direct Transfer of Rights Tax to the Authority'	Contractors should not be able to transfer licenses if they have not paid the tax due on the transfer.
N/A New Regulation	New Regulation 23 bis	New Draft Regulation 23 bis Taxation of the Direct Transfer of Rights -to read: 1.) The transferor shall pay a Direct Transfer of Rights Tax to the Authority whenever there is a transfer of rights under an exploitation license. 2.) The Direct Transfer of Rights Tax shall be equal to 25% of the transferor's profits from the transfer of the exploitation rights.	It is best practice and common practice in extractive industry taxation to tax the direct transfer of rights. Contractors may make significant profits selling licenses. Under the current payment regime the Authority and humankind would receive nothing

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		3.) The profits from the transfer of the exploitation rights shall be equal to the amount received by the transferor for the transfer minus the actual and direct exploitation expenditures made by the transferor under the exploitation contract. 4.) The Authority shall issue Standards providing for further details of the, administration and enforcement of the Direct Tax on the Transfer of Rights and for related matters.	when a contractor transfers/sells an exploitation license. There should be a tax on the transfer of rights so that humankind can fairly share in the profits contractors make from selling exploitation rights. Under draft regulation 39 contractors are already responsible for keeping accounts that include 'actual and direct expenditures for exploitation'
N/A New Regulation	New Draft Regulation 23 ter	New Draft Regulation 23 ter Taxation of the Indirect Transfer of Rights text to read: 1. The Authority shall levy a 25% Indirect Transfer Tax on any gain made from the transfer of a 20% or greater interest in any entity which derives 50% or more of its value, directly or indirectly, and regardless of where that entity is incorporated, from rights under Exploitation Licenses, assets used to undertake commercial mining under Exploration Licenses, and activities undertaken in the Area. 2. Any series of transfers that could have been undertaken as a single transfer, but which were undertaken as a series of transfers so as, in the sole opinion of the Authority, to avoid the 25% Indirect Transfer Tax, shall be treated as if they were a single transfer. 3. The transferee shall be responsible, regardless of where that entity is incorporated, for: a. calculating the value of the gain as equal to the gross consideration to be received by the transferor minus the paid-in capital of the transferor; b. calculating the amount of the 25% Indirect Transfer Tax on that gain;	There may be an attempt to avoid the direct tax on transfers by transferring exploitation licenses indirectly. For example, company A, which is resident in a low tax jurisdiction, may own 80% of the Contractor. Company A may sell this 80% stake to Company B, which is also resident in a low tax jurisdiction, for significant profits. Under the current regulations mankind would not receive anything from this transaction despite the profits from the transfer ultimately deriving from the value of minerals in the Area. It is important that such transactions are taxed and that mankind benefits whenever profits are made from exploitation rights in the Area. The new regulation would ensure that a tax is paid and mankind benefits whenever profits are made

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		c. informing the Authority of the Indirect Transfer Tax due; d. paying the Indirect Transfer Tax to the Authority; and e. deducting the amount of the Indirect Transfer Tax from the consideration received by the transferor for the transfer. 4. The Authority may revoke without compensation the Exploitation License that has been transferred when the Transferee has: a.)failed to inform the Authority within 90 calendar days of the transfer taking place of a transfer which could conceivably have led to a tax liability under the Indirect Transfer Tax; b.)intentionally underestimated the tax liability under the Indirect Transfer Tax; or c.) failed to pay the Indirect Transfer Tax due within 120 calendar days of the transfer. 5. The Transferor shall receive a tax refund or pay additional tax as the case may be, when it can provide evidence that in the opinion of the Authority is convincing, that the amount of the Indirect Transfer Tax actually received by the Authority from the Transferee was different from 25% of the true market value of the gain from the transfer, and in such a case the value of the tax refund, or additional tax as the case may be, shall be equal to the amount of tax actually received by the Authority from the Transferee minus 25% of the true market value of the gain. 7. The Authority shall issue Standards further providing for the administration, and enforcement of the Indirect Transfer Tax and for related matters.	from the transfer of shares in companies that derive their value from exploitation rights. The tax is specified as a withholding tax, with the payment being the responsibility of the transferee in the first instance. This is necessary as it is difficult to enforce a tax on the transferor, as once it has transferred its interest it will not have any assets in the Area. In contrast, the Authority can take effective enforcement action against the transferee as it derives its value from indirect ownership of the exploitation license, which the Authority can revoke. The transferee deducts the tax due from its payment to the transferor, and the transferor can claim a tax refund if the deduction exceeds the amount of the tax. Thus, the transferor who profits from the sale, ultimately bears the cost of the tax.
DRSD	63	Regulation 63 Incentives 1. ~~1.~~ The Council may, taking into account the recommendations of the Commission and the Finance Committee, provide for incentives on a uniform and non-	

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		discriminatory basis, to Contractors to further the objectives of the Enterprise participating in the activities in the Area, the transfer of technology to developing states and the training of nationals of developing states as provided for in annex III to the Convention. 2. ~~the objectives set out in article 13 (1) of annex III to the Convention based on the principles provided in paragraph 1(a) of section 6 and paragraph 1(a) of section 8 of the annex to the Agreement.~~ ~~2. Furthermore, the Council may provide incentives, including financial incentives, to those Contractors entering into joint arrangements with the Enterprise under article 11 of annex III to the Convention, and developing States or their nationals, to stimulate the transfer of technology thereto and to train the personnel of the Authority and of developing States.~~ 2~~3~~. The Council shall ensure that, as a result of the incentives provided to Contractors under paragraphs 1 ~~and 2~~ above, Contractors are not subsidized so as to be given an artificial competitive advantage with respect to land-based miners. 3~~4~~. Any incentives shall be fully compatible with the policies and principles under Regulation 2.	Article 13 of Annex III to the convention: Financial Terms of Contracts provides for incentives (**not financial incentives**) for objective 13.d which refers to the Enterprise, technological transfer and training only. Article 13 does not provide for incentives to be provided for the other objectives specified in it, such as attracting investment in the Area. Moreover, the subsidisation of contractors through the provision of subsidies does not concord with international best practice in the regulation of extractive industries and would not be beneficial to humankind. The Authority should be encouraging efficient, low cost, profitable contractors that can and should pay taxes: not inefficient high-cost contractors that can only mine if they receive financial incentives.
N/A New Regulation	New Regulation 64 bis	Regulation 64 bis Additional Royalty Payment 1. In addition to the royalty provided for in Regulation 64 contractors shall pay an additional royalty to the Authority. 2. A contractor from the fourth anniversary after the first day of commercial production shall pay an additional royalty in respect of mineral-bearing ore sold or removed without sale from the Contract Area as provided for in appendix IV to these regulations.	The entire payment regime was designed based on the MIT model that assumes that miners pay a 25% corporate income tax to the sponsoring state. The reality is quite different. Over two thirds of the published sponsorship agreements provide for a complete exemption from sponsoring state corporate income tax.

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		3. The additional royalty payment shall be equal to Gross Additional Royalty Liability minus Sponsoring State Corporate Income Tax Actually Paid and Verified when: a.) Gross Additional Royalty Liability is equal to the rate of 7.2% multiplied by Aggregate Relevant Metal Value as provided for in appendix IV to these regulations; and b.) State Corporate Income Tax Actually Paid and Verified is equal to actual cash payments of corporate income tax paid by the Contractor to its sponsoring State arising from profits made due to deep-seabed mining in the Area -for the year previous to that year for which the Additional Royalty Payment is being calculated and where there is a letter from the tax authority of the sponsoring State confirming that -those corporate income tax payments were made and a signed report from an international accounting firm of high repute confirming that the corporate income tax payments were paid and that the corporate income tax liability arose due to profits from deep-seabed mining in the Area and not from other activities undertaken by the contractor. 4. Sections 4,5,6,7 and 8 of these Regulations shall apply to the additional royalty as they do to the royalty provided for in Regulation 64.	An additional royalty in lieu of sponsoring state corporate income tax would solve this problem. As it allows contractors to deduct corporate income tax paid to their sponsoring state from this additional royalty payment. Thus, if, as MIT assume, contractors do pay significant sponsoring state corporate income tax then the payments they make under this royalty may fall to zero and will not affect their profits. In the alternate where contractors do not pay significant sponsoring state corporate income tax then payments under this additional royalty will be significant, the financial benefits received by humankind will increase and rates of payment between land-based and deep-sea mining will be broadly similar. The royalty starts in the fifth year of commercial production as the fourth year of commercial production appears to be the first in the MIT model where there are corporate income tax payments. The royalty is set at 7.2% as at this rate, in the MIT model, if contractors do pay CIT at 25%, the net payments from the royalty would be zero. At the other extreme, if there are no CIT payments by the contractor, the ISA would receive an additional $4,125 billion in royalty payments over the life of the mine. The African Group recognise that the figures quoted above are preliminary figures and we are happy to discuss them further with MIT and contractors.

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			The African Group also recognises that the provided draft text represents a starting point for the regulation and that editing may be required to ensure consistency of language with other regulations.
BNFTC	65	Regulation 65 Secretary-General may issue Standards ~~Guidelines 1~~. The Secretary-General may, from time to time, issue Standards ~~Guidelines~~ in accordance with regulation 95 in respect of the administration and management of royalties prescribed in this Part. 2. The Secretary-General shall consider all requests for the clarification of any Standards ~~Guidelines~~ issued under paragraph 1 above, or on any other matter connected with the administration and management of a royalty and its payment.	Standards may need to be developed for the Royalty.
BNFTC	70	Regulation 70 Payment of royalty shown by royalty return 1. A Contractor shall pay the royalty due for a royalty return period on the Day the royalty return is required to be lodged. 2. Payments to the Authority may be made in United States dollars or other foreign currency which is freely convertible. 3. All payments made to the Authority shall be made gross and shall be free of any deductions, transmission fees, levies or other charges. ~~4. The Council may approve the payment of any royalty due by way of instalment where special circumstances exist that justify payment by instalment.~~	Contractors should pay royalties when due. There are no circumstances where delayed payment should be approved. Regulation 70(4) should thus be deleted.
BNFTC	81	Regulation 81 Review of system of payments	Regulation 81 provides that changes to the system of payments can only be applied to existing exploitation contractors with the contractor's consent.

Source	Reg	Text (Amended Text Marked in Track Changes)	Explanation and Justification
		1. The system of payments adopted under these regulations and pursuant to paragraph 1 (c) of section 8 of the annex to the Agreement shall be reviewed by the Council five years from the first date of commencement of Commercial Production in the Area and at intervals thereafter as determined by the Council, taking into account the level of maturity and development of Exploitation activities in the Area. 2. The Council, based on the recommendations of the Commission~~, and in consultation with Contractors,~~ may revise the system of payments ~~in the light of changing circumstances~~ and following any review under paragraph 1 above, save that any revision shall only apply to existing exploitation contracts after five years of commercial production have been completed under that exploitation contract ~~by agreement between the Authority and the Contractor~~.	Contractors are unlikely to agree for changes to the system of payments that reduce their profits to apply to existing exploitation contracts. Thus, if for example, after the Exploitation Regulations are approved, it becomes apparent that Contractors are exploiting loopholes in the Exploitation Regulations to minimise their payments to the Authority then the Authority would have little ability to close these loopholes and contractors' tax avoidance could continue unabated for the duration of the 30 year term of the exploitation contract. If contractors do not agree to changes to the system of payments applying to their existing exploitation contracts, then this effectively provides contractors with fiscal stability and protects them from changes in the payment system for the entire thirty years of the exploitation contract. The African Group has consistently argued that fiscal stability for the term of the exploitation contract does not conform to international best practice. This view has recently been confirmed by an IGF Report[2] which states: 'Periodic review of financial terms of extractive industry contracts is increasingly seen as best practice. Stabilisation of the financial terms for the

[2] Intergovernmental Forum on Mining, Minerals and Sustainable Development, Issues Paper: Workshop on the Financial Terms of Contractors for Deep-Sea Mining, July 2022

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			tenure or a contract (up to thirty years in this case) **is not**.' (emphasis added). The OECD Guiding Principles on Durable Extractive Contracts[3] is a good reference for best practice in extractive industry taxation. Paragraph 54 of this guideline argues that Governments should not necessarily include fiscal stability clauses and that where they do they should be limited to specific fiscal terms (not all fiscal terms), should be for a limited period of time (not the full term of the exploitation contract) and that contractors should pay a premium for fiscal stability. The Draft Regulations should be amended to limit the fiscal stability afforded to contractors. The simplest way to do this would be to allow changes in the structure of the payment regime and changes in the rates of fiscal instruments to be applied to existing contracts after five years of commercial production had been completed under the license. Thus, if commercial production started under an Exploitation Contract in 2025, and the system of payments was amended in 2028, these amendments would not apply to that Exploitation Contract until 2030
BNFTC	82	Regulation 82 Review of rates of payments	 Regulation 82 effectively provides contractors with fiscal stability in the rates of payment until the end of the Second Period of Commercial Production.

[3] OECD, Guiding Principles on Durable Extractive Contracts, 20220, See: Guiding-Principles-Durable-Extractive-Contracts-2020.pdf (oecd.org)

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		1. The rates of payments under an existing system of payments shall be reviewed by the Council five years from the first date of commencement of Commercial Production in the Area and at intervals thereafter as determined by the Council, taking into account the Resource category and the level of maturity and development of Exploitation activities in the Area. 2. The Council, based on the recommendations of the Commission ~~and in consultation with Contractors~~, may adjust the rates of payments in the light of such recommendations ~~and consultation~~, save that any adjustment to the rates of payments may only apply to existing exploitation contracts after five years of commercial production have been completed under that exploitation contract ~~from the end of the Second Period of Commercial Production reflected in appendix IV to these regulations.~~	The Draft Regulations do not mention a third period of commercial production, and thus it appears that the end of the second period of commercial production is the end of the 30-year contract. As discussed in detail for Regulation 81, providing fiscal stability to contractors for the entire length of their contract does not concord with international best practice and is unlikely to maximise benefits for humankind. Regulation 82 should thus be amended to provide fiscal stability for a much shorter period, in our view five years would be appropriate.
BNFTC	Appendix IV	1. The Authority shall set a royalty rate The Authority shall set an Applicable Royalty Rate in respect of the royalty to be paid by the Contractor to the Authority for Minerals which constitute polymetallic nodules, as set out in the Standard. ~~and taking into account the Guidelines.~~ 2. Calculation of royalty payable The royalty payable to the Authority for each royalty return period shall be the product of the Applicable Royalty Rate multiplied by the Aggregate Relevant Metal Value for that royalty return period, calculated in accordance with the Standard. ~~and taking into account the Guidelines~~	The provisions for the payment regime must be binding on contractors and should be included in the Draft Regulations themselves to the greatest extent possible. Additional provisions should be provided in a binding 'Standards' only and not 'Guidelines'.
BNFTC	Appendix IV.1	1. The Authority shall set a royalty rate	The royalty rate should be set in the Draft Regulations or Standards, it should not take account of non-binding guidelines.

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		The Authority shall set an Applicable Royalty Rate in respect of the royalty to be paid by the Contractor to the Authority for Minerals which constitute polymetallic nodules, as set out in the Standards and taking into account the Guidelines.	While recognising that work to date has concentrated on polymetallic nodules there will undoubtedly be a royalty on other minerals, and the details for this will presumably be provided for in additional Standards.
BNFTC	Appendix IV.1	21 Enclosure III Draft Standard In the present Standard: First Period of Commercial Production means a period of 5 years following the date of commencement of Commercial Production. Second Period of Commercial Production means a period of [?] years following the end of the first period of Commercial Production Third Period of Commercial Production means a period of [?] years following the end of the second period of Commercial Production	All periods of commercial production need to be defined.
BNFTC	Appendix IV.1	Listed Price means: 1. For copper, nickel and cobalt: the price (in United States dollars), quoted for the Relevant Metal in the Official Listing relating to that Relevant Metal for the relevant period. 2. For manganese: the result of the following calculation: the electrolytic manganese metal price in the applicable Official listing price for the relevant period. (0.1 x EMM Price) + (0.4 x LC FeMn Price) + (0.4 x MC FeMn Price) + (0.1 x HC FeMn Price) where: (a)EMM Price means the price (in United States dollars), quoted for electrolytic manganese metal in the applicable Official Listing for the relevant period; (b)LC FeMn Price means the price (in United States dollars), quoted for low-carbon ferromanganese in the applicable Official Listing for the relevant period;	The MIT model assumed, and included costs and royalty rates consistent with this assumption, that manganese was processed to the electrolytic manganese metal (EMM) grade. If the royalty rates proposed are levied on a base containing different/lower manganese prices then the conclusions from the MIT model are no longer relevant and the royalty rates should be revised upwards to maintain ISA revenues. Likewise, the African Group's minimum acceptable royalty rates assume that the royalty is levied on a base using the EMM price. If there is a change to the

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		~~(c) MC FeMn Price means the price (in United States dollars), quoted for medium-carbon ferromanganese in the applicable Official Listing for the relevant period; and~~ ~~(d)HC FeMn Price means the price (in United States dollars), quoted for high-~~	manganese price used then the royalty base will be lower and payments to the ISA will be lower, and the African Group will then revise its minimum acceptable royalty rates upwards to maintain acceptable revenues for humankind. It is important to understand that the regulations are not dictating what manganese grade processors process manganese to. The royalty regulations are simply determining a base on which the royalty is applied. There is no reason that the Draft Regulations cannot use the EMM price for that base. Trying to understand exactly what grade processors will process manganese to is likely to be a fruitless and unconstructive task that will only serve to delay the Draft Regulations. Reasons for this include: a.) some nodules may be processed to the EMM grade, while others will be processed to a lower grade, b.) different contractors will sell nodules to different processors, and not all processors will process nodules to the same grade, c.) some contractors may not even know the full downstream sales and processing chain. They will sell unprocessed nodules and are not legally responsible for what happens to the metal in those nodules downstream.

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			In short, the main criteria for the royalty base are that it is simple to calculate, easy to audit and results in significant revenues for the ISA.
BNFTC	Appendix IV.1	1. Relevant Metals a.) For the purpose of polymetallic nodules and appendix IV during the first period of commercial production –Relevant Metals will be copper, nickel, cobalt and manganese only. b.) During the second period of commercial production and subsequent periods of commercial production relevant metals will include copper, nickel, cobalt and manganese and may include other metals and substances, but only if there is substantial evidence that such other metals and substances are being processed from mineral-ore mined under the exploitation contract and are substantially increasing the value of polymetallic nodules mined in the area and in such case additional Standards will be published providing for the inclusion of these other metals and substances in aggregate relevant metal value.	The relevant metals can initially be copper, nickel, cobalt and manganese. However, if as mining progresses, there is evidence that rare earth element are being processed from nodules and sold, and/or that other substances from the Area are being processed and sold and that this is increasing contractors' profits, then there needs to be a mechanism to revise how the aggregate relevant metal value is calculated to include these relevant metals and substances.
BNFTC	Enclosure III	The references to 'Guidelines' should be removed.	The details of how the royalty is calculated and administered should be contained in binding Standards. It is not appropriate for details of how the royalty is calculated, which will affect the Authority's revenues, to be included in Guidelines that are not binding on contractors.
BNFTC	Appendix IV.1	~~For the First Period of Commercial Production, [2%]; and~~ 2. For all periods of commercial production ~~the Second Period of Commercial Production~~, a rate no less than [125%] and no greater than [259%] determined by reference to the table below and the Notional Relevant Metal Value: Where:	Despite the royalty rates not being agreed and the Chairman's briefing note explicitly recognising this, the low, unacceptable previously proposed royalty rates are included in Appendix IV.1. Either all rates should be removed or the minimum royalty rates acceptable to the African Group should be inserted.

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		(a) Notional Relevant Metal Value means the [average Aggregate Relevant Metal Value per dry metric ton across all Shipments during the royalty return period]. (b) The [average Aggregate Relevant Metal Value per dry metric ton across all Shipments during the royalty return period] shall be calculated by dividing the Aggregate Relevant Metal Value for that royalty return period by the total Quantity shipped during that royalty return period. Notional Relevant Metal Value [~~(as may be adjusted in accordance with the Guidelines)]~~ Applicable Royalty Rate for all periods of ~~Second Period of~~ Commercial Production Less than US$850 per dry metric ton (x < US$850/t) [12~~5~~%] 24 Greater than or equal to US$850 per dry metric ton but less than US$925 per dry metric ton (US$850/t ≤ x < US$925/t) [15.3~~6~~%] Greater than or equal to US$925 per dry metric ton but less than US$1,000 per dry metric ton (US$925/t ≤ x < US$1,000/t) [18.5~~7~~%] Greater than or equal to US$1,000 per dry metric ton and less than US$1,075 per dry metric ton (US$1,000/t ≤ x < US$1,075/t) [21.8~~8~~%] Greater than or equal to US$1,075 per dry metric ton (US$1,075/t ≤ x) [25~~9~~%]	The logic underpinning these minimum acceptable royalty rates is provided in the African Group Submission on the Payment Regime for Deep-seabed Mining in the Area, June 2022 which states: '12. The African Group has also replicated the MIT model of DSM mining. With realistic assumptions concerning corporate income tax and hurdle rates, this Replicated Model shows that for: a.) Option 1: a single rate royalty, a rate of 14.4% maximises ISA revenues; b.) Option 2: a time varying royalty, rates of 6.4%/19.3% maximise ISA revenues; and c.) Option 3: a hybrid regime with a royalty of 5%, 30% profit share and 30% additional profit share has merit. In addition, a previous African Group submission showed that for Option 4: a price varying royalty, a royalty rate range of 12% to 25% maximises ISA revenues.' In addition, as discussed above, there may be scope to lower the minimum acceptable rates if the text provided for the additional royalty in lieu of sponsoring state tax was accepted.

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